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THE NEW YORK STATE PUBLIC SERVICE COMMISSION: COUNSEL PHILIP HALPERN

JUSTICE PHILIP HALPERN was appointed Counsel to the New York State Public Service Commission effective January 1, 1944. The duties of Counsel to the Commission are wide-spread in scope. In addition to defending Commission determinations before Appellate Courts, he represents the Commission in all of its litigation. He represents the Commission before federal regulatory agencies when the Commission determines to appear in their proceedings on behalf of New York state consumers. In addition, he acts as house counsel for the Commission. He advises the Commission of the legality or legal import, complications or consequences of proposed determinations.

Counsel to the Public Service Commission occupies a position which is vastly different from that of Counsel to other State Departments which have a limited function of house counsel. The Attorney General is the State's attorney and is in charge of virtually all of the State's legal proceedings. Counsel to the Commission however acts independently of the Attorney General. He represents not only the Commission, but in addition is duty bound to protect the interests of the people of the State of New York in all actions and proceedings in which the Commission is involved.

The public Service Commission has a wide jurisdiction over the utilities subject to its jurisdiction. In the transportation field these include railroad companies insofar as intrastate operations are concerned, omnibus companies, contract carriers of passengers and common and contract carriers of property. In addition, all gas, electric, telephone, telegraph, water and steam companies are regulated by the Commission. Briefly, the Commission's regulatory power encompasses the fixation of rates, adequacy and safety of service, and the issuance of securities. In order to effectuate its regulatory jurisdiction, the Commission determines whether they should be granted the certificate necessary before they may commence operations and is empowered with general supervision over such companies.

This article is concerned with Justice Halpern's four year tenure of service with the Commission. It is obvious from the importance of the position that only the most significant matters handled by him, and those which have a long-standing impact upon public utility regulation, can be encompassed herein.

Counsel Halpern made lasting contributions in the field of administrative law by successfully defending actions of the Commission against various legal assaults.

On April 12, 1945, the Commission adopted an order prescribing temporary reduced fares for Syracuse Transit Corporation, effective May 1, 1945. The opinion of the presiding Commissioner containing the usual findings upon which the order was based, was not adopted at the same time because the Commissioner was ill and other members of the Commission desired to suggest certain changes

in his report. On April 25th the Commissioner's report was unanimously adopted. On April 26, 1945, an action was instituted against the Commission in equity to enjoin the enforcement of the Commission's order on the ground that it was void for lack of findings. The Commission had never been confronted with this problem but Halpern was successful in convincing the court that the order itself contained sufficient jurisdictional findings, and in any event the Commission's order of April 12th was not void, but at worst merely voidable, because any insufficiency of findings was validated upon the subsequent adoption of the Commissioner's report prior to the effective date of the order. The company's application for a stay was denied and it thereafter discontinued the action and the temporary fares prescribed by the Commission became effective.¹

In May of 1946 the Commission directed Rochester Gas & Electric Company to enter certain entries upon its books and accounts reducing the dollar amount of its plant accounts. Applications for rehearing to the Commission may be made pursuant to Section 22 of the Public Service Law, which provides that the Commission *shall* act thereupon within thirty days. The company made a timely application to the Commission for rehearing. The Commission did not act upon the application until forty days thereafter when it granted rehearing. The company instituted a proceeding to review the Commission's May determination, contending that since the Commission had not acted within the prescribed period of thirty days the grant of rehearing on July 23rd was a nullity, and the May order was reviewable. Counsel Halpern moved to dismiss on the ground that the matter was still pending before the Commission. The court upheld his position that the language of Section 22 was directory only and not mandatory despite the use of the word "shall," and the Commission had jurisdiction to act after the expiration of the thirty-day period.²

Counsel Halpern made additional contributions to the field of administrative law by successfully contending that in certain matters other than those specified by statute the Commission had a continuing jurisdiction, and could re-open Commission, whose functions were transferred to the Public Service Commission on its own motion, a matter apparently finally determined by it. The Transit in 1943 had adopted various orders determining that public welfare required the elimination of specified grade crossings of the Staten Island Railroad and streets in Staten Island and approving the final elimination plans rendering the project ready for construction in 1941. World War II prevented construction and in 1944 the Commission, seeking to consider a change in the plans to achieve a saving of approximately one million dollars to the State, upon Counsel's advice adopted an order reopening the proceeding. The Railroad and the City of New York challenged the power of the Commission to reopen and instituted a proceeding in the nature of prohibition to restrain the Commission. The courts

1. *Syracuse Transit Corp. v. Maltbie*, 55 N.Y.S.2d 671 (3d Dep't 1945).

2. *Rochester Gas & Elec. Corp. v. Maltbie*, 272 App. Div. 163, 71 N.Y.S.2d 326 (3d Dep't 1947).

held that the Commission had the jurisdiction and the duty whenever the public interest so required, to give consideration to any changes in the plan or method of elimination which would be in the public interest, despite a lengthy line of cases holding that a public agency could not reopen a proceeding once it had reached a final determination. The courts adopted Halpern's thesis that the Commission had a continuing jurisdiction over grade crossing eliminations and could consider changes even after the adoption of a final order.³

Halpern's ingenuity was again displayed when the Commission, after a series of proceedings and legal disputes with the International Railway Company which provided omnibus and trolley service in Buffalo and Niagara Falls (now served by Niagara Frontier Transit) determined that even the full exercise of its powers had not sufficiently protected the public interest. He drafted legislation,⁴ which became Section 119 of the Public Service Law, empowering the Commission to order a utility to file a petition for bankruptcy with the federal courts. The Commission instituted a proceeding to exercise its new power with respect to the International Railway Company. The company applied to the Supreme Court for an order in the nature of a prohibition, enjoining the Commission from holding its proceeding on the ground that Section 119 was violative of the Federal and New York State constitutions. Before the case was decided at Special Term, the company ceased contesting the constitutionality of the Commission's powers and filed a petition for reorganization under the Bankruptcy Act.

Counsel Halpern's legal skill had its impact upon many substantive aspects of the Commission's actions. The Commission was empowered by Section 114 of the Public Service Law to prescribe temporary rates subject to provisions set forth therein, including a provision requiring the Commission to take into consideration in the fixation of permanent rates, the financial effect upon the company of such temporary rates during the period when they were in effect. This "recoupment" provision was aimed at avoiding constitutional arguments which the utilities had been using to delay the effective date of rate reductions.

The constitutionality of Section 114 was challenged by the utilities. In one such attempt, the Staten Island Edison Corporation commenced an action in equity to enjoin the enforcement of a temporary rate order prescribed by the Commission. That action was argued by Counsel Halpern in the Court of Appeals which upheld the constitutionality of Section 114 and affirmed the dismissal of the complaint.⁵

The utilities also sought to obtain a stay of the effective date of the Commission's order prescribing temporary rates pending review thereof. In a series of cases Counsel Halpern's argument that a temporary rate order could

3. *City of New York v. Maltbie*, 53 N.Y.S.2d 234, 248-49 (Sup. Ct. 1945), *aff'd*, 269 App. Div. 662, 53 N.Y.S.2d 953 (1st Dep't 1945), *aff'd*, 294 N.Y. 931, 63 N.E.2d 119 (1945).

4. N.Y. Sess. Laws 1947, ch. 334, eff. Mar. 24, 1947.

5. *Staten Island Edison Corp. v. Maltbie*, 292 N.Y. 611, 55 N.E. 376 (1944), *affirming*, 267 App. Div. 72, 45 N.Y.S.2d 337 (3d Dep't 1943).

become effective forthwith or within a short time after the adoption of the order was accepted.⁶

In order for Section 114 to be promptly utilized and to accomplish effective regulation in numerous other respects, it is necessary for the Commission to ensure that the entries in the books, records and accounts of utilities subject to its jurisdiction are made properly and kept current. In a series of accounting cases Counsel Halpern successfully defended Commission accounting determinations directing companies to delete amounts from their plant accounts improperly entered therein. The importance of these accounting determinations cannot be overemphasized. By the elimination of amounts improperly charged to plant accounts the Commission is in a better position to thwart any attempts of utilities to inflate the amount upon which they may earn a return.

Another instance of Counsel Halpern's effect upon regulation occurred when several omnibus companies operating in New York City challenged the Commission's jurisdiction to regulate their fares because the fares had been set forth in franchises granted by the City pursuant to various provisions of the New York City charter. Counsel Halpern successfully defended the Commission's position and secured dismissal of all the proceedings. The courts upheld Halpern's argument that the Commission had power to regulate such fares despite the fact that they were fixed in the City's franchises.⁷

Counsel Halpern's efforts to defend the Commission's position were not always successful. In 1947 Rochester Gas and Electric Corporation applied to the Commission for authority to issue securities totaling over 20 million dollars. At that time the Commission was holding a proceeding with respect to the books and records of the company in which the staff had questioned 17 million dollars in the company's property accounts. The Commission authorized the company to issue the securities upon condition that it make annual reservations to appropriated surplus before payment of dividends on the common stock, said reservations to continue until they totaled the amount in question, indicating that if such reservations subsequently turned out to be excessive, such excess would be transferred to the company's surplus account free of all restrictions.

The company refused to accept these conditions contending that the Commission's power to pass upon its security application under Section 69 of the Public Service Law did not encompass the power to impose the conditions. Despite Counsel Halpern's efforts to defend the Commission's position, the Appellate Division annulled its determination by a vote of three to two.⁸

6. *Staten Island Edison Corp. v. Maltbie*, *supra* note 5; *Syracuse Transit Corp. v. Maltbie*, 55 N.Y.S.2d 671 (3d Dep't 1945); *Rochester Transit Corp. v. Public Service Comm'n*, unreported decision of Murray, J., Supreme Court, Albany County, March 29, 1945, vacating stay provision in order to show cause of March 27, 1945.

7. *Queens-Nassau Transit Lines v. Maltbie*, 296 N.Y. 893, 72 N.E.2d 618 (1947), *affirming*, 271 App. Div. 81, 63 N.Y.S.2d 712 (3d Dep't 1946), *affirming*, 186 Misc. 424, 61 N.Y.S.2d 81 (Sup. Ct. 1946).

8. *Rochester Gas & Electric Corp. v. Maltbie*, 273 App. Div. 114, 76 N.Y.S.2d 671 (3d Dep't 1948).

Subsequent to Halpern's resignation as Counsel, the Court of Appeals affirmed.⁹

In another series of cases Counsel Halpern successfully established the Commission's assertion that utilities could not abandon operations without securing the Commission's approval. The statutory authority for such assertion of power was very meager.

In *Springbrook Water Company v. Village of Hudson Falls*,¹⁰ Counsel Halpern achieved a major advance in establishing the Commission's position that utilities could not discontinue operations without its consent. That proceeding involved a sale of a private water company to a municipality over which the Commission had no jurisdiction. The company had applied to the Commission for approval of the transfer without prejudice to its position that the Commission had no jurisdiction thereover. The Commission determined that the price agreed upon between the village and the company was unreasonable and the transfer was not in public interest and indicated that if the price were reduced to \$200,000, which the Commission held to be reasonable it would approve the transfer. The company sought specific performance of the contract and entered into a submission of controversy with the village before the Appellate Division, Third Department. The company's argument was that per the language of the Section 89-h of the Public Service Law, the Commission's approval of a transfer was limited to transfers *between corporations* subject to the Commission's jurisdiction and did not encompass transfers to municipalities which were not within the Commission's jurisdiction. The company's position was supported by the fact that in numerous instances throughout the Public Service Law the legislature had drawn a clear line between private corporations and municipal corporations and the language of Section 89-h specified transfer to corporations only and did not even mention municipal corporations.

Counsel Halpern appeared as *amicus curiae* and argued in defense of the Commission's power by asserting that Section 89-h was operative with respect to the transfer and not with the acquisition of the property. In support thereof he contended that the entire spirit of the Public Service Law including provisions that utilities keep rates for their service on file with the Commission, necessarily empowered the Commission to pass upon a proposed abandonment of service by a utility. He argued that it made no difference whether the cessation of utility service was by transfer or otherwise and that it was unimportant to whom the property was being transferred. He argued that the Commission's consent was necessary for a sale to anyone. The Appellate Division upheld Counsel Halpern's argument holding that the fundamental question before the court was whether a public utility having embarked upon a public enterprise and having dedicated its property to the public use could cease rendering such service without the consent of the Commission.

9. *Rochester Gas & Elec. Corp. v. Maltbie*, 298 N.Y. 867, 84 N.E.2d 635 (1949).

10. 269 App. Div. 515, 56 N.Y.S.2d 722 (3d Dep't 1945).

In his last court proceeding as Counsel for the Commission Halpern wrapped up the Commission's jurisdiction over abandonments of service by utility companies and demonstrated his outstanding legal qualifications and ability to act with extreme rapidity. The Long Beach Bus Company had advised the Commission by letter dated November 5, 1947, that it was going to cease operations within ten days because of its great financial losses. Counsel Halpern and his staff worked over the weekend and instituted a summary proceeding by means of an order to show cause signed on the 10th and returnable on the 14th. Halpern's contention that the company needed the Commission's approval to discontinue operations was upheld on the 17th. Because the company claimed that it was in extreme financial difficulties an immediate appeal was taken to the Appellate Division, Second Department, which heard argument, upheld Halpern's position, and granted leave to appeal to the Court of Appeals on the same day. At the commencement of the argument the Chief Justice called counsel's attention to the fact that no notice of appeal had been filed. By general agreement the court heard the argument and a notice of appeal was filed thereafter. On the 27th, the Court of Appeals handed down a unanimous opinion reaffirming the principle that no public utility could discontinue service without prior approval of the Commission.¹¹

At the conclusion of the argument, Chief Justice Loughran leaned over the bench and said to Counsel Halpern:

Now you sit down. There's something I want to say to you. . . . You have argued here with great dialectical and professional skill and often have saved this court from committing error—an undertaking at which many lawyers feel they had indifferent success. Now you are going on to a high office. I am confident you will serve with distinction and great credit.¹²

On December 31, 1947 he resigned to become a Justice of the Supreme Court.

SAMUEL R. MADISON, *Secretary*
New York State Public Service Commission

11. *Maltbie v. Long Beach Bus Co.*, 297 N.Y. 723, 77 N.E.2d 21 (1947), *affirming*, 272 App. Div. 1069, 75 N.Y.S.2d 304 (2d Dep't 1947), *affirming*, 75 N.Y.S.2d 861 (Sup. Ct. 1947).

12. *Buffalo Evening News*, Nov. 28, 1947, p. 8, col. 1.